THE JURISTIC PERSON.—II.

The effort to deal with the corporation, now as a name, again as a form of co-ownership, and yet again as a personality, produces a state of chaos which is as dangerous to the corporation as to the suitor who seeks redress against it. A corporation is prosecuted for violation of a law which makes the acceptance of a lower freight rate than that applicable to the public generally, a misdemeanor.[15] It denies knowledge of the correct rate, but is convicted of an intent to violate the law, for which a fine is imposed. The corporation is a large one. Some of its stockholders may be in China; they have no intent. The corporation is a fictitious being. But fictitious beings have no intent. And collective property has no intent. Hence we convict, we know not what, we know not whom, of knowledge of the law and intent to violate it.

A problem of a different sort may arise. There are no shareholders, and there is, peradventure, nothing of the corporation but a name.[16] The Court has said that this is a corporation, self-sufficient enough to prevent the associates being charged as partners pending the issue of stock.

The first conception that is attached legally to a person of any sort is that of a holder of rights. Persons are regarded as having some common inheritance in a fund of privileges, which are considered as having an origin beyond human consciousness. Be their source divine, or let it reside in the common consent of humanity, they are readily assented to as the portion of every individual, inviolable and unassailable. All humanity stands ready to avenge an affront to any of these so-called natural rights or privileges, and the world is cosmopolitan in this, that it affords no

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[15] *United States* v. *Standard Oil Co.*, 155 Fed. Rep. 305.

[16] *In re Western Branch* v. *Trust Company*, 163 Fed. Rep. 713.

asylum to him who has deprived another of the right of existence.

Let us consider an idea quite far removed from this. And we may borrow again, an analogy from mathematics. Suppose an object, a rock, for example, too ponderous to be moved by less than twenty men. One of them, two or three of them, exert all of their strength, and the rock stands unmoved. The entire body of twenty exert their strength and displace it. By what is it moved? By the addition of one man to another? Scarcely. It is moved by the simultaneous action of a score. For that particular purpose, a portion of the energy of each individual has been fused into a common fund which is effective only as a fund. Each man, even while exerting his strength, possesses other attributes, and each individual while contributing his share of strength may be using his mind for a different purpose. The collective effort, it will be understood, differs from any individual effort in effect. If we could classify efforts as genus and species, we should say that the concerted effort was genus and the individual effort species.

Upon these two conceptions, viz., the conception of rights and the conception of concerted action, whether the concerted act be the holding of property, or the organization by which some great enterprise is carried out, the idea or theory of the corporation rests.

The idea of rights implies universal rights—since every one, for the purposes of this discussion, at least, must be taken, not only to protect his own rights, but to observe those of others. Hence, in the possession of rights is involved the negative idea of duties. The holder of rights is likewise a debtor to duties. He owes duties. Does the corporation do either? We may deny this or affirm it. In either event, the denial or affirmation must be susceptible of an analysis that will withstand criticism. Let us examine first the views of those who deny it.[17]

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[17] The statement of the representative theory which follows is epitomized from Freund, The Legal Nature of Corporations.

1. *The corporation is not, as such, the subject of rights and object of duties, but is a peculiar method of co-ownership of property.*

Rights are generally represented by the vesting of control and interest in property to one person. This does not arise from necessity and they may, in fact, be separated—the interest may be vested in one and the control in another. We may think of a right, therefore, as split up into two parts, viz., control and interest.

In the case of a trust there is a protected interest and therefore a right. The control and interest are separated and no one person is the holder of the right in the same sense as he is in a normal case. But the interest is identified with some definite person. The trustee having control is definitely X, and the *cestui que* trust is definitely Y.

But interests must often be secured in which the right does not inhere in some definite person. This is true in the case of charities and the like, where control of the property cannot be vested in the parties in interest, who are indefinite in number, whose members are unascertainable, constituting present and future generations, who cannot co-operate in performing legal acts. For this purpose trust rights are created.

Where the control is vested in a person for the benefit of an abstract and ideal interest, the interest must be designated by a name, and the holding of the right must be identified with that name, for the interest has no distinct personal inherence, that is, it is not definitely owned by A or B or C. This means that certain relations and resources are controlled, no matter by what particular individuals, for the service and benefit of well-defined aims and purposes to be pursued under given conditions and through prescribed channels, all of which is understood or can be ascertained by reference to the name of the institution; and conversely an obligation may exist in favor of some person, to be satisfied out of certain funds, no matter through whose agency the payment will be made. We thus personify a complexity of interests by assimilating it to a personal beneficiary being

well aware that what we personify has no volition or acting capacity, a fiction which is as harmless as it is useful, like so many others to which we resort constantly for the convenience of thought and speech. The personification of the purpose is necessarily fictitious and the fiction supplies the absence of any determinate person on the side of the interest, while the control is of course in the hands of real persons. The name of a corporation is merely a cloak for the action of several persons having identity of purpose.

The idea of the joint relation requires in addition to identity of purpose a conecting tie between a number of persons with reference to that purpose. Inasmuch as the public cannot control legal rights, as a legally disconnected mass of individuals, but is merely a beneficiary, the rights of the public are exercised by the State or its sub-divisions, and in so far as enjoyment is concerned, by any individual who can show an interest.

The parties to any joint enterprise have an interest in the preservation of the joint relation and of the undivided control. This interest is relevant only where co-operation among the joint parties fails. In the case of disagreement, the problem arises how joint holding of rights and community of interest can be reconciled with each other. In the case of partnership the law insists upon concurrent action, the joint relation being dissolved where that fails. This is impracticable where the permanent relation is a necessity and is indissoluble, as in the case of a corporation. In such an event, the law may accept the action of those who do concur as the action of all the associates, ignoring those who fail to act. If all of the associates agree as to the action, but differ as to the method to be pursued, the law may indicate which of the contending parties shall prevail. In either case all are bound by a portion; that is, all of the associates act by representation. This is original representation as distinguished from that which rests upon delegation, such as agency, and which is common to the exercise of rights several as well as joint.

Original representation assumes two forms according

to the circumstances. Where some of the associates entitled to act abstain from action, those who act, a quorum for example, are regarded as representing all. Where there is a difference of opinion the majority controls the minority.

Where action by representation is recognized we may speak of the collective interest of a mere joint holding of rights. In the case of joint tenancies and tenancies in common, or other joint relations having no representative action, the principle of representation is not secured to each party against any other, since all must concur in every act.

Those forms of joint holding in which the principle of representation is not fully recognized, consist generally of a small number of joint parties. Where the number of associates is considerable the principle of representation becomes a practical necessity, and they tend therefore to assume a collective form of holding of rights. In the case of governmental bodies, actual concurrence of all parties is impossible, and all direct action must be by original representation; likewise, the majority generally prevails. In the case of a business corporation of small numbers, acts of delegation are generally unanimous and everyone is likely to share in the joint control. Since representative action is possible, however, undivided control is likewise possible, and a collective body consequently acts and appears as a unity. The fact that persons who dissent are bound by the action of a majority does not mean that they are excluded from the act of representation. Their act of opposition means that they are given an opportunity of influencing the formation of the controlling will and by the assertion of their wishes and opinions; their failure to control indicates weakness either of position or of numbers. Abstention from action means acquiescence in the action of those who have actually taken part. A share in the control is legally secured to all although it may prove incapable of affecting the final act.

The principle of original representation has the effect that some persons may by their acts dispose of rights belonging to others; or in other words, that rights may be disposed of without proper legal acts on the part of those to whom

they belong. Acts done by a person which normally affect his rights may in this connection fail to have that effect as to rights held by him with others. The resolution of a majority imposes obligations on the minority, and the deed of a shareholder purporting to convey an undivided share in corporate property is wholly ineffectual. The majority and minority are treated by the law exclusively with reference to a common relation sustained by them to each other and to a common purpose, and the force of their acts is determined accordingly as they express more or less strongly the fact of the relation. What determines the preference or exclusion of one party or another is not specific personality, but the relative position of the person in the representation of an interest. It is not the question of A, B, C, D against E and F, but the question of the majority against the minority, or the question of those acting under the common bond against those failing so to act. The law does not connect the right with A, B or C, absolutely, but only in so far as they remain within a certain sphere of interest and within the *nexus* of a certain association. This element which is of fundamental importance in the conception of a corporation may be designated as subjective differentiation.[18] This is no unreal abstraction. The acts of a person are different as he acts in different capacities. Hence a shareholder of a railroad company has no direct right of property in the rolling stock,

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[18] The principle involved in subjective differentiation is simply that the shareholder's right to act and the effect of his act depends upon some matter personal (subjective) to himself, viz.: whether or not he has acted within the sphere (nexus) of action circumscribed by his share of stock. Suppose, for example, that all of the capacities in which a man could act, were three in number. 1. As a citizen. 2. As a member of Congress. 3. As a member of the X Railroad Company.

His acts as a member of Congress have no effect whatever upon the inner life of the X Railroad Company, and vice versa. To whatever extent he participates in the acts of the railroad company it must be in his capacity as a stockholder in a meeting with the other stockholders, and in compliance with the formalities prescribed—in other words, his acts are effective as a stockholder only when performed within the bond or nexus of association. Going one step farther we determine the nature and effect of his act by dissecting his personality into three capacities and deciding within which of these capacities the act under discussion falls. This is subjective differentiation.

roadbed, cars, etc. He cannot use a car at his pleasure, and he is a trespasser if he attempt to perform acts of ownership. His property right can be exercised only through the *nexus* of association, only in a meeting with his associates, and then only through the performance of certain functions in a certain manner. In a meeting with his associates his will may prevail or be disregarded, but his action outside of this connection is of no effect whatever.

From saying the right does not belong to A generally, but to A only in a certain capacity, it is only a short step to say the right belongs to the personal holder and representative of a certain interest, whether the personal holder is A or B. We substitute, in other words, for a specific person a representative capacity; the right follows its object; that is, the interest instead of its subject, namely, the holder. This may be called the objective determination [19] of the inherence of rights, another important element in the conception of a corporation. A right must always be connected with some ascertainable person in order to identify it and secure it against other conflicting interests. The name of an individual usually furnishes this means of identification, which is called the title. But in the case of the objective determination of the right, the means of identification is a certain interest embodied in concrete conditions so that the title remains the same as long as the interest continues regardless of change of person. They become the indifferent and shifting actors of the character which is not affected by their individualities.

If we correctly understand the qualified nature of the inherence of rights in the persons associated, the conception of the association follows easily as a simple sum of the rights so qualified.

The member of a corporation being able only to exercise his corporate rights only within the *nexus* of association,

[19] While the nature of the act of the shareholder is determined by subjective differentiation, the inherence of his rights is determined objectively, viz.: by reference to an object, to the share of stock. The right inheres in the person who owns the share of stock.

individual exercise must be consolidated into collective exercise. The controlling will appears, therefore, as a unit. This outward unity is expressed by a collective name and title, which stands for an aggregate, but an aggregate of similar component parts. But since the individual's share in the joint act is scarcely perceptible, his acts as a private person are kept separate from his acts in conjunction with others and the law treats corporation and member as two different holders (of rights) and for all practical purposes only such treatment can do justice to the nature of the relation. Where two corporate bodies have practically the same members, the test of the distinctiveness of their rights and obligations is whether or not there is such independence of interest and control that the acts of the one organization can under any circumstances legally affect the rights of the other.

The aggregate body also partakes of the nature of its constituent elements in being affected by the objective determination of the inherence of rights. That is to say, the corporate name indicates, not a group of particular individuals, but the objective element, let us say property, of the relation. It is not the presence of the shareholder that goes to make up the personnel of the corporation, it is the association of a certain interest, represented by a share of stock, with any individual, that, with other shares, make up the thing for which the corporate name stands. The rights belong to a definite group of persons, at any one time, but the personal reference is defined by association and not by individuality. An individual, in other words, does not bestow a certain character on his interest or share, but the interest defines the share or participation of the shareholder. The personal *nexus* is uniform as each member represents an interest which is the same for all, but is essentially continuous. The shares of stock are outstanding in the names of some individuals, A, B, C—K, or L, M, N—X, it is a matter of indifference which; the name of the corporation has no different significance, nor is its connotation altered.

The salient characteristics of the body corporate, unity,

distinctiveness, identity in succession, hence appear as corollaries of the principle of representative action.

If we analyze this outline of what, for convenience, will be referred to as the representative theory, the principles established will resolve themselves somewhat in this fashion.

1. Corporations are essentially property holding bodies, in which the control of the property and the interest in it, are separated. Certain persons control the property for the benefit of the abstract and ideal interest designated by the name of the corporation.

2. Thus the complex interests of the corporate members are personified by assimilation to a personal beneficiary, which has no real existence beyond the needs of convenience. The name affords besides a tie, which binds together those engaged as stockholders in the enterprise.

3. Large bodies of men being unable to act as a unit the corporate body acts by original representation. The act of a portion, such as a majority, is recognized as binding all.

4. The choice of the action which shall bind all is determined by subjective differentiation, whereby may be ascertained those who have acted under the common bond, as against those who have not.

5. The location or inherence of the right to act or help to act, is determined objectively by reference to the share of stock. The person who owns the stock and his individuality are matters of indifference.

6. The property of the corporation is a fund out of which certain obligations are to be satisfied, all to be determined by reference to the name of the corporation.

7. Each shareholder being the owner of a qualified right, the association must be conceived as the sum of the rights so qualified. Each individual can exercise his right only within the nexus of association, and hence, individual exercise must be consolidated into collective exercise. The controlling will therefore appears as a unit.

8. Since the individual's share in joint acts is scarcely perceptible his acts as a private person are kept separate

from his acts in conjunction with others, and the law therefore must treat corporation and member as two distinct holders of rights.

These propositions may be considered the principal elements in the conception of a corporation afforded by the representative theory. It must be observed, however, that a definition which leaves its two distinctive and radical features ambiguous, does not offer an adequate solution of the problem which it purports to resolve.

Two principles in this conception are fundamental, viz., *original representation* and the *modification of the conventional theory of rights.*

The principle of representation may be recognized as a form of agency. Its effect is that some persons may dispose of the rights of others without proper legal acts on the part of those who own them. This is at least debatable. The corporation connotes both activity and the ownership of property. The question is whether or not the effect of action by a majority, is to dispose of the rights of others without proper legal action. If one hundred shareholders pass upon a corporate act in a stockholders' meeting, the act being adopted by a vote of sixty to forty, the acquiescence of the forty is equivalent to participation. If the action of the majority is oppressive, the minority may prevent the action or set it aside.[20] If a matter of internal government, and they do not care to participate, they have always a way of retreat from a solvent corporation by a sale of their stock. If the acts from which they dissent have a tendency to impoverish or destroy the corporation, they again have redress.[21]

Let us consider the position of the defeated electors in a republic. The relative strength of the voters may be eight millions against six millions. If the minority acquiesce in the election, they become parties to the act, and the president or other official is their president. Their resistance

[20] Bagshaw *v.* Eastern Union Ry. Co., 7 Hare, 130.

[21] Bagshaw *v.* Eastern Union Ry. Co., *supra.*

could be made very effective, if, as a body, they decided to exert it. The impending emigration of any large proportion of a body of people because of dissatisfaction or unwillingness to participate in the acts of a majority will inevitably so modify the acts of the majority that the acts finally adopted will represent truly the acts of all. Corporate action is therefore the act of all the associates, wherever the defeated parties acquiesce.

If this illustration seem extravagant, one need only consult the immigration records of the United States. "The increment of national population from immigration alone has reached 1,300,000 a year! America is depopulating Europe." In New York alone, there are "more Irish than in Dublin, more Italians than in Rome, more Germans than in Munich, and more Jews than there ever were in Jerusalem, if not in all of Palestine." [22] These are facts—they are not debatable. The Governments of Europe, to prevent entire loss of the discontented minority have done what? First, in some cases they have imposed restrictions on emigration, a repressive measure doomed to inevitable failure, since an attempt to compel submission to evil conditions from which a way of escape lies at hand will be evaded by disobedience or fraud. Second, by alleviating the conditions that have produced the discontent—in other words, by granting the desires of the minority—which, is in effect, if they accept and acquiesce, making them participants in the act of the state. We assume, as axiomatic, that the ultimate source of all governmental power resides in the consent of the governed.

But there are more serious difficulties in the way. It is necessary, before accepting the representative theory to modify our conception of rights. "If the individual, private, and beneficial right is to measure and govern all rules relating to rights of whatsoever nature, then the corporate right will continue to be abnormal and illogical. If, on the other hand, we emancipate ourselves from the absolute rec-

[22] Ivins and Mason, The Control of Public Utilities, Preface, X.

ognition of one form of right as orthodox, if we admit that the incidents of a right may vary according to the difference of interests for the protection of which it exists, and according to the difference of conditions under which that protection must operate, we may well arrive at the conclusion, that in dealing with the association of persons we must modify the ideas which we have derived from the right of property in individuals, and what has first seemed to be an anomaly will appear simply as another but equally legitimate form of development." [23]

So much as this should not be necessary. The corporation is truly an abnormal form of development, if, in order to make it a legitimate form of development, we must abandon the conventional idea of rights. The word right is one of the constants of legal reasoning. If its attributes are to be shifted—if its connotation is to be altered with the changing circumstances under which it is exercised, it is somewhat difficult to discover what is gained by having a rational theory of corporations. Was it not Procrustes who had a bed which fit all of his guests—the short ones were stretched—the long ones were cut to size.

But our premises merit further scrutiny. The principle of subjective differentiation enables us to decide between majority and minority by selecting the act of those who have acted under the common bond as against those who have not. The majority therefore, acts within the nexus of association. Does not the minority do the same? It would seem not, under the view proposed. The nexus of association then, cannot be a factor of weight in the reasoning employed, nor would it seem to justify the law in selecting anyone as against any other. For, the bond of the associates is the same for all—the interest of all is uniform—the act of a stockholder is effective only within the nexus of association. But apparently, although a stockholder has done all of this, his failure to agree with the majority has placed his act beyond the nexus of association. If this be true, the

[23] Freund, Legal Nature of Corporations, p. 48.

courts have no right, in any event, to interfere on behalf of the minority stockholders, oppressed or not. "Acting in a meeting with his associates the relative strength of position will determine the effect of his acts; his will may prevail or be defeated, according to a preponderance of concordance between the associates, but his will and action outside of this connection has no effect whatever.[24] The minority shareholder thus becomes the victim of a nexus which is as variable as his rights.

If now, the inherence of the right may be determined objectively, is it true that the location of the right is a matter of indifference? Are the stockholders the shifting and indifferent actors of a character which is not affected by their individuality?[25] If a corporation were simply a mass of property, this assertion might be made with some degree of plausibility. It is, however, manifestly contrary to the facts. The X and Y railroad corporations have parallel and competing lines. They are so situated that they drain the same territory, and the competition threatens the life of both. Their policies are antagonistic. The X company or its stockholders, in the market acquire a controlling interest in the Y company, and a change in the policies of the two roads is immediately perceptible. Schedules are changed, mutually hostile resolutions are abandoned—they operate under some friendly agreement. Has the character of Y changed or not? Are the new stockholders of Y shifting and indifferent actors of a character unaffected by their individualities? Illustrations of this sort might be multiplied. Is it a matter of indifference that a large proportion of the stockholders of a newspaper corporation have an interest in the advocacy of a protective tariff?

But the property of the corporation presents more difficulties. The name of the corporation indicates that certain obligations are to be satisfied out of a certain fund, to

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[24] Freund, op. cit. p. 34.

[25] Freund, op. cit. p. 35.

be determined by reference to the corporate name. Obligations are owing. They are not owing by the name, nor by the fund. Whose obligations are they? What determines how, when and why they are to be paid. The fund exists. To whom does the fund belong? A theory of corporations which slights this question has really gone but a short distance toward the solution of corporate activity. And if the name be a convenient fiction by reference to which all of these questions of right, of obligations, of title to funds are to be answered, a corporate name has a content different from that of all other names. We must add to this that the name likewise represents a collective or controlling will, which, since individual exercise of rights is in the corporation consolidated into collective exercise, appears as a unit. This proposition carries us in an ingenious circle to the precise point at which we started, viz., that there is a controlling and collective will acting as a unit. When we conclude, finally that the individual's acts as a private person must be kept separate from his acts in conjunction with others, because his share in the joint act is scarcely perceptible; in other words because it cannot be separated from the joint act, the effort to solve the problem of corporate existence by superadding the principle of agency to that of the *persona ficta* becomes hopeless.

It should be recalled that the representative conception involves an analysis of rights into control and interest, the use of fictitious personality to a limited extent, and the application of the principle of agency. Let us now consider all joint holding of property as a peculiar state of property.[26]

II. *Property exists in two states, the individual and the collective. The corporation is a form of collective property.*

Collective property is not to be confounded with co-ownership of individual property in an undivided state. While it remains undivided, there is nevertheless, autonomy [27]

[26] Planiol, Droit Civil, Tome I., pp. 970, *et seq.*

[27] Autonomy. The author quoted intends, of course, by autonomy here, identifiability or individuality.

of the portion of each individual; every part, although actually confused with the others, has its own proprietor, and he is independent of the others. He alone can deal with his portion. Co-ownership of undivided property therefore, is always individual property, with actual confusion of the parts. Furthermore, this confusion is necessarily transitory and accidental. The mingling or confusion is not the object—is not a permanent characteristic of this kind of property; its characteristics on the contrary are isolation and independence, and for this reason, the very state of being undivided tends naturally toward partition and provokes it.

Collective property is nothing of the sort. It is a peculiar state of property, which is in itself an end, and which has its own *raison d'etre.* It results from the necessary grouping of the persons to whom it belongs. There are many classes of property which must be transformed into this state, in order that they may render to mankind all of the services of which they are susceptible, and which are not destined to become the object of private property. The distinction between these two classes of property consists of more than words. The difference lies in this, that collective property suppresses the antonomy of the individual parts—indeed, to be exact, these parts do not exist; the property or thing is used in common or, there is a *complete affectation to the general utility,* which in most cases takes place without any contact whatever with the thing utilized. It is thus that the entire nation profits by the strength of its fortresses or of its ironclads, although the citizens may not have individually either usage or possession, and although the majority of them may never have seen them. Individual property is unable in itself to satisfy all the needs of mankind, from which it results that it is necessary to preserve the two classes of property side by side, and the partition of collective property so that it may become the object of individual utility is a question of opportunity and convenience.

These classifications may become clearer if we consider an example of each. A is the owner of a house. He owns it individually—it is individual property. A and B own the

same house, jointly or in common. A may sell his half, B may sell his half. The share of each, though unsevered, is his individual property, and may by appropriate proceedings be set out to him. The house is still individual property.

A, B, C, D and E form a corporation which purchases the same house. A nor B nor C has any distinguishable share in the house. There is no way in which his share can be severed. In other words there is complete affectation of the house to the general utility of A, B, C, D, and E.

The collective ownership of property involves no conception of a person, real or fictitious. The power of words is such that, this word person once launched into circulation, has attached to it an absolute value. We lose sight of the reality, and no longer think that these pretended persons are but devices to simplify the administration of corporate property. And thus originates the theory of a kind of persons instead of the theory of a kind of property. The most serious effect of personification of the corporation is that the fictitious person gradually assumes the attributes of real persons. Most authors concede to the fiction the same rights and the same capacity as a real person, saving two exceptions, viz.: 1. When, in the nature of things it is impossible, as in the case of family relations. 2. When their capacity is limited by law. But it is conceded likewise that such beings do not participate in the privileges of the law of nature, because they are creatures of the legislature which may treat them as it will.

These are words without sense, because there are not two kinds of persons. There is but one, and the law makes its enactments only for men, for their liberties and for their goods. What the legislator finds before him is men individuals, citizens, either isolated or in groups, and, when his law is unjust, it is no imaginary person that suffers.

By the name of fictitious person, or juristic person, must be understood the existence of collective property in the state of distinct masses, possessed by groups of men, more or less numerous and elminated from individual control.

Where then is the necessity of creating a second class of persons, which has no existence in nature, to comprehend a second form of property, the existence of which is a self evident truth?[28]

The ultimate holder of every right is man.[29] The rights that form the patrimony of the juristic person are for the benefit of the individual members of the corporation, present or future. It is not an accidental effect, but the very object of the relation. The individual members are the real subjects of the juristic person. Practical considerations require that the common interests of the corporation be pursued, not by the individual members, but by the collective group of members, represented by an artificial personal unity. But this juristic person is incapable of playing any part as such, it has neither interests nor aims. Nor can it have rights, for rights are possible only where they have attained their destination, that is to say, where they can be useful to their holder. A right which can never attain its goal in the person of such a holder is a chimera that cannot be reconciled with the fundamental idea of the principles of law. Such an anomaly can exist only in appearance. The apparent subject of law conceals the real one.

The fiction is not the real holder of the corporate right, the fiction is but one step in the administration of the property, and the rights that are attributed to the *persona ficta,* in vitalizing it, belong in reality to the individuals for whom it is a formula. For example, the Louvre belongs to the French, and the British Museum to the English. When it is said that they belong to France or to England, we make use of an abstract formula which there is no need to materialize. The world knows no holders of rights but men.

"When this view is adopted, all of the difficulties associated with the *persona ficta* vanish. The majority of the questions to be resolved upon this subject are difficult only because they are badly put. We rectify this difficulty and

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[28] Planiol, op. cit. pp. 975, 976.

[29] Ihring, Geist des Romischen Rechts.

we see that what is called a *persona ficta* is but a peculiar kind of riches, viz., property in its collective form, and that there are no persons, but human beings." [30]

The problems of corporate activity then become these:

1. Given, property of a certain kind.
2. The formation of a common mass.
3. Its administration.
4. Its dissolution.

Everything proceeds then, in the simplest possible fashion. Juristic acts of all kinds, sales, purchases, loans, payments, mortgages, are made for the profit of the collectivity, in the same manner as for individuals, and they produce the same effects. The rules applicable to the administration of individual property hold good for collective property.

By means of the conception of collective property we have now reached our starting point. We begin with a problem, and we end with the same problem, except that for some reason it is no longer a problem. Whatever rules are applicable to the individual apply to the corporation. This is idle talk. A shareholder either has a reconizable interest in corporate property or he has not. If he has not, how is his interest to be treated on the same basis as if it were individual property. Or treating the corporate property as collective property and dealing with the common mass of property in its relation to the group as a whole, on the same basis as if they were individuals similarly placed, what role is assigned to the collectivity. What is the collectivity that is to be treated as an individual. And we begin again inevitably to personify. It seems as if this collectivity that confronts us inexorably at every turn in the path acted much like a reality.

To treat the property as the problem, and its controlling factor—to solve the actions of men united in groups for the attainment of some common end, by reference to collective property, is, if flippancy be permissible, letting the tail wag the dog. Our problems are too varied to be thus

[30] Planiol, op. cit. p. 977.

dismissed. Our corporations have citizenship, domicile, they commit torts, recover damages for torts committed against them, and act and appear as units. It is beside the question that ultimate rights reside in the individuals. That question may well rest until we have to deal with the individual. It is beside the question that the ultimate rights to French warships and fortresses are really in the Frenchmen and not in France, in an abstract unreal France. That might be a very nice question, if the French nation were dissolved, and it is questionable whether the individuals that composed the French nation at that time could make good their title. In any event, we never have to deal with the ultimate rights of the Frenchmen while we must deal with the French nation. Let the ultimate rights in the Pennsylvania Railroad Company be wherever you choose, but the present rights concern us most. Violate those rights and who redresses them? And are they actual rights or imaginary ones?

We cannot leave this question unanswered, "Is the corporation a right and duty bearing unit?" If it is not, our corporation still needs an interpreter, for it does, and yet theoretically cannot do.

The shareholder's rights cannot be adjusted by saying that we must deal with the situation precisely as we do in the case of any other individual owning property. For if the stockholder is the ultimate *"destinataire"* of corporate property, why put him in the anomalous position of having neither interest nor control of his goods. Nor may the question be dismissed by saying, "Avaunt, spectral person, there is no being but the human." France, real or unreal, must be dealt with; the Pennsylvania Railroad Company, not its stockholders, for the present, at least, confronts us. The question of its rights as a group must be answered. And we cannot ignore its responsibility when none can be fastened upon the stockholders.

The object of uniting men in the form of corporations is not the holding of property. That is generally an incident, it is true, of corporate activity. But it is not a

necessary incident. The limitation of the shareholder's liability is likewise generally an incident of corporate holding —it is not a necessary incident. The property, of itself, produces no results. It is the effect of corporate activity, whether in connection with property or not, that gives rise to concern. The formula proposed must answer the three questions already stated. Does the corporation have rights and duties? Is it responsible? What are the rights of those who compose it? The modern view is in accord with the tendency that has subordinated the unlimited application of *laisser faire* to the expressed will of the genus. In other words, in recognizing to the fullest extent, the principle of individual freedom, account must be taken of the fact that individual activity stands below generic activity. The corporate genus, therefore, is expressed by this formula:

III. *The corporation is a right and duty bearing unit, which belongs in the class of persons.*

George F. Deiser.

(To be Continued.)